IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA.

OSA No.8 of 2006.

Judgment reserved on: 8.8.2007

Date of Decision: September 20, 2007

Dhanpat Seth & others ..Appellants.

Versus.

M/s Nil Kamal Plastic Crates Ltd. ..Respondent

Coram:

The Hon'ble Mr.Justice Deepak Gupta, J.

The Hon'ble Mr. Justice V.K.Ahuja, J.

Whether approved for reporting?

For the Appellant (s)	:	Mr. Vinay Kuthiala & Ms. Vandana Kuthiala, Advocates.
For the Respondent(s)	:	Mr. Bipan Chander Negi, Advocate.

Deepak Gupta, J.

This appeal is directed against the order passed by a learned Single Judge of this Court in OMP No.530 of 2005 in Civil Suit No.69 of 2005 rejecting the prayer of the appellants-plaintiffs for grant of interim relief.

The brief facts relevant for disposal of this appeal are that the appellants, hereinafter referred to as the plaintiffs, filed a suit seeking grant of permanent prohibitory injunction restraining the defendant from infringing patent No.195917 granted in favour of the plaintiffs on 11.7.2005. The patent has been granted in respect of a device used for manufacture of manually hauling the agricultural produce. According to the plaintiffs, the invention was

visualized by them in 1999. They developed it over a period of time and applied for grant of patent on 24.5.2000. The patent was granted in their favour on 11.7.2005 but it will relate back to the date of application i.e. 24.5.2002. The invention of the plaintiffs as set out by them in the plaint is as follows:-

> "A device for hauling agriculture produce comprising a contained of synthetic polymeric material defined by a hollow frusta-conical body open at he top and closed at the based and tapering from the operative open at the top and closed at the based and tapering from the operative open top to the base with perforated walls said perforations being essentially quadrilateral in configuration and reducing in dimensions from the operative top to the base; said wall having a contour adapted to proximate the back of a human body; and removable harnessing means secured to the container in the upper perforations, said harnessing means having straps and buckle formations adapted to be irremovably secured in and around the perforations in the said walls and looping means around the back and the shoulders of an individual, said straps and buckle components of the harnessing means being adjustable to permit the harnessing means to be secured to the container at varying locations on the wall of the container in the perforations and the looping means adapted to be adjusted to accommodate individuals of different heights and body structure."

The plaintiffs further alleged that the respondent- defendant, hereinafter referred to as the defendant, in fact, sold this device to the Department of Horticulture, Govt. of H.P. and other private parties. The plaintiffs consequently filed a suit praying for a decree for grant of permanent prohibitory injunction in their favour

restraining the defendant from infringing the patent No.195917 and also for a decree of mandatory injunction virtually in the same terms. The plaintiffs also prayed that the defendant be directed to pay them Rs. 51 lacs.

The defendant contested the suit and contended that the plaintiffs have fraudulently obtained the patent and the patent has wrongly been granted in their favour. The defendant further alleged that there is no novelty or invention in the patent and in fact it is just centuries old device popularly known as **"KILTA"** which was originally made of bamboo and has now been produced in plastic. It is also further alleged that the defendant had anticipated the device in fact in December, 2001. It designed a similar **Kilta** and sent drawings of the same for manufacturing of the design to Arries Moulding Company Ltd. Taiwan and thereafter the production of the Kilta was started and the same was introduced in the market.

The plaintiffs along with the suit filed an application for grant of interim relief seeking temporary injunction restraining the defendant from manufacturing or selling its version of the Kilta or committing any acts which may infringe in the patent granted to the plaintiffs. This application was contested by the defendant and the learned Single Judge by a well reasoned order dismissed the application for grant of interim relief. The learned Single Judge has come to the conclusion that the device patent of which was obtained by the plaintiffs is basically an imitation of the traditional **Kilta**. There is no novelty about the same. The learned Single Judge has also came to the conclusion that the suit of the plaintiffs is hit by

the principle of doctrine of anticipation since the product had been in the market even prior to the same being patented. This order is under challenge before us.

It would also be pertinent to mention that during the course of this appeal, the plaintiffs had filed an application placing on record an order passed by the Assistant Controller, Patents & Design, rejecting the application filed by the defendant for revocation of the patent granted in favour of the plaintiffs.

We have heard Shri Vinay Kuthiala, learned counsel for the plaintiffs and Shri Bipan Chander Negi, learned counsel for the defendant.

Shri Vinay Kuthiala contended that the plastic Kilta developed by the plaintiffs is an invention and in the alternative submitted that the development of the traditional Kilta into a plastic one with adjustable nylon straps is an inventive step and amounts to an invention. He further submitted that the grant of patent itself is a conclusive fact to hold that there is a prima facie case in favour of the plaintiffs. He has also submitted that the doctrine of anticipation is not applicable since various steps relied upon by the learned Single Judge to come to the conclusion that the suit is hit by doctrine of anticipation were only steps taken by the plaintiffs to submit their product before the expert bodies for their evaluation of the device and no steps have been taken to market the same.

To appreciate the rival contentions of the parties, it would be relevant to refer to the definition of invention and inventive steps in Section 2(j) and 2(ja) of the Patents Act, 1970:

2(j) **"invention"** means a new product or process involving an inventive step and capable o industrial application;

(ja) **"inventive step"** means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art;"

Section 3(p) of the Patents Act reads as follows:-

> "3(p). an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components."

A bare perusal of the definition of invention clearly shows that even a process involving an inventive step is an invention within the meaning of the Act. It is, therefore, not necessary that the product developed should be a totally new product. Even if a product is substantially improved by an inventive step, it would be termed to be an invention. The definition of 'inventive step' provides that when technical advances as compared to existing knowledge take place in an existing product or there is improved economic significance in the development of the already existing device and the invention is not obvious to people skilled in the art, it would amount to an inventive step.

The learned Single Judge had seen the products of the plaintiffs, the defendant and the traditional **Kilta**. We also called upon the parties to produce their respective devices as well as the traditional Kiltas.

A Kilta is a traditional product which has been used since time immemorial for carrying produce including agricultural produce in hill areas especially in the State of Himachal Pradesh. The traditional Kilta is made of bamboo. The shape of a Kilta is conical having a wider circular opening on the top and it tapers and narrows down at the bottom. There is virtually no difference in the overall design of the traditional **Kilta** or the **'devices'** developed by the plaintiffs and the defendant. A visual comparison of the three items prima facie establishes that the articles manufactured by the plaintiffs and the defendant are virtual copies of the traditional Kilta. The only difference is that the Kilta is made of bamboo and the Kilta made by the plaintiffs is made of polypropylene copolymer (PP). The Kilta made by the defendant is also made of polymeric material. The Kilta manufactured by the defendant is made of high density polyethylene (HDP). In actual fact, both the materials are polymers in common parlance known as plastic. The only visible difference is that device now being manufactured is having detachable nylon straps with buckles. The question which arises for consideration is whether this change of material from bamboo to plastic and the development of adjustable nylon straps with buckles is an inventive step falling within the meaning of Section 2(ja).

Shri Vinay Kuthiala, contended that by changing the material from bamboo to plastic there is a great economic gain and there is technical advance of economic significance. Though the cost of Kilta made of plastic may be higher than that of Kilta made of bamboo, its life is much longer making it more economic. He further

submits that the Kilta is designed in such a manner as to make it easy to carry heavy load and therefore, this is an inventive step.

After having seen the traditional Kilta and the devices of the parties and having examined the same, we are prima facie of the view that the devices being manufactured by the parties are only imitations of the traditional Kilta. Shri Vinay Kuthiala has contended that the traditional Kilta was only supported by rope on the forehead. This assertion is in fact incorrect. The traditional **Kilta** used in Himachal Pradesh is by and large supported by adjustable ropes going over the shoulders. In some cases, the supporting strap goes over the forehead. Both types have been in existence for times immemorial.

The apex Court in **M/s Bishwanath Prasad Radhey Shyam** v. **M/s Hindustan Metal Industries**, AIR 1982, SC1444**,** while dealing with the meaning of the word 'inventive step' held as follows:-

> "21. It is important to bear in mind that in order to be patentable an improvement on something known before or a combination of different matters already known, should be something more than a mere workshop improvement; and must independently satisfy the test of invention or an "inventive step'. To be patentable the improvement or the combination must produce a new result or a new article or a better or cheaper article than before. The combination of old known integers may be so combined that by their working inter-relation they produce a new process or improved result. Mere collection of more than one integers or things, not involving the exercise of any inventive faculty, does not qualify for the grant of a patent."

The device being manufactured by the plaintiffs is basically a Kilta but made out of synthetic polymeric material which is commonly known as plastic. The process of making traditional items out such ploymers is a well known and well established process. This court can take judicial notice of the fact that much prior to the device being manufactured by the plaintiffs, traditional items made out of woods, steel, brass, leather and other natural materials have been replaced by plastic. In this regard reference may be made to chairs, tables, jugs, baskets, shoes and numerous other items which were traditionally made of natural material but are now made of plastic. Therefore, in our opinion, the mere fact that the device is made of polymeric material instead of bamboo is not an inventive step involving any novelty. There is nothing new about the process of manufacturing the traditional Kilta made of natural material from synthetic material. Even nylon straps now added are virtually copies of the ropes used n the traditional Kilta. The ropes in the Kilta can also be adjusted by the user keeping in view the height of the person using the Kilta and the weight being carried by him. The mere introduction of buckles would not amount to a new device being called an invention or an inventive step.

Shri Vinay Kuthiala has laid great emphasis on the order dated 2.7.2007 passed by the Assistant Controller, Patents and Designs, whereby he has rejected the application for revocation filed by the defendant.

At the outset, it would be pertinent to mention that the Controller before dealing with the matter did not even take the

traditionally built Kilta into consideration as a citation. His reasoning in this regard is as follows:

> "Exhibit A is a Bamboo made Kilta with a strap but there is no proof of date of its publication. Hence the said document cannot be taken into consideration as a citation."

We fail to understand the reasoning given by the Assistant Controller, Patents & Designs in not taking into traditionally built Kilta into consideration. Even the case set up by the plaintiffs was not that he had invented an entirely new product but his case was that he had developed a traditional Kilta by means of inventive steps in such a fashion that it amounts to a new invention. The contentions of both the parties could not have been appreciated without first taking into consideration the traditional Kilta. On this short ground alone we feel that much reliance can be placed on the aforesaid order.

Mere grant of patent in favour of the plaintiffs by itself does not mean that the plaintiffs are entitled to any injunction. This is a factor which may be taken into consideration and would be a relevant factor but the grant of patent would not *ipso facto* entitle the plaintiffs to grant of an injunction without taking into consideration other relevant factors. In fact Section 107 of the Patents Act clearly provides that in any suit for infringement of a patent every ground on which it may be revoked under Section 64 shall be available as a ground for defence. Therefore, the defendant is entitled to argue before this Court that the patent granted is not valid. Reliance placed upon by the plaintiffs on the judgment of the apex Court in **Midas Hygiene Industries (P) Ltd.**

and another v. **Sudhir Bhatia and others** (2004) 3 SCC 90 is totally misconceived. The action in the case was under the Trade Marks Act where the provisions are different. It may be true that Section 28 of the Trade Marks Act is similar to Section 28 of the Patents Act but under the various provisions of the Patents Act, such as sections 64 and 107(2) even after the patent is granted, the same can be challenged in appropriate proceedings.

We also find that the device manufactured by the plaintiffs has been termed as hauling device. The learned Single Judge is absolutely right in holding that the so called device is not a device of hauling but basically a device for carrying the produce.

The House of Lords, in [1975] I All England Law Reports 504, **American Cyanamid Co** v. **Ethicon Ltd.,** clearly laid down that the governing principle with regard to grant of injunction is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he could be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not be an adequate remedy to the plaintiff in the event of the success in the trial, the court can grant injunction in favour of the plaintiff by ensuring that the defendant is

adequately compensated in case the trial culminates in his favour. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.

It also held that where other factors appear to be evenly balanced the rule of prudence would be to preserve the status quo. In the case before the House of Lords, the defendant had not started manufacturing of absorbable surgical sutures and it is in these facts that relief of temporary injunction was granted. In the present case, the defendant has already started manufacturing and selling the Kiltas and has been doing so for a number of years. In our opinion, at this stage it would not be appropriate to put the clock back.

In respect of the arguments addressed on the doctrine of anticipation, even if we discount the production of the device by the plaintiffs prior to 24.5.2002, it is clear that prior to this date, the defendant had sent the drawings for production of the Kilta to Taiwan. At this stage of the suit when evidence is still to be recorded, the said material cannot be discarded.

Keeping in view the aforesaid discussion, we are clearly of the view that the device developed by the plaintiffs is in fact the result of traditional knowledge and aggregation/duplication of known products such as polymers and, therefore, cannot be said to be an invention. The plaintiffs are, therefore, not entitled to any injunction.

It is, however, made clear that any observations made in this appeal are only limited for the purpose of deciding the application

for grant of interim relief and shall not be construed as the observations on the merits of the suit.

It is, however, amply clear that even if the court does not grant interim relief in favour of the plaintiffs, some directions must be issued to ensure that in the event of his success in the action, his interests are protected. We, therefore, direct that the respondent shall maintain full and complete accounts of all the sales made of the Kiltas manufactured by it. The defendant shall submit the returns in this Registry of this Court every quarter. A copy of this return shall also be handed over to Mr. Vinay Kuthiala, counsel for the appellants/plaintiffs. The defendant shall file a consolidated return for all the Kiltas sold by it from the date of institution of the suit till 30.9.2007 by 31st October, 2007. Thereafter the defendant shall file quarterly returns depicting the sales of each quarter within 30 days of the ending of each quarter. The defendant shall also file copies of the complete accounts with regard to sale of the Kiltas made during the pendency of the suit duly certified by the Chartered Accountant of the defendant-company in a similar manner. The respondent/ defendant shall furnish a surety bond in the sum of Rs. 20 lacs to the satisfaction of the Registrar (Inspection) of this Court undertaking to pay the decretal amount, if any, which may be decreed in favour of the plaintiffs and against the defendant. This order has been passed to protect the interest of the plaintiffs in case they succeed.

The appeal is disposed of in the aforesaid terms. No costs.

(Deepak Gupta), J.

September 20, 2007. (V.K.Ahuja),J.

s.